STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
Michael J. Talbot, P.J., Kirsten Frank Kelly and Karen M. Fort Hood, J.J.

CHARLENE TATE,

Plaintiff-Appellant,

v

CITY OF DEARBORN,

Defendant-Appellee.

_____/

Supreme Court No. 129241

Court of Appeals No. 261950

Wayne County Circuit Case
No. 04-404500-NO

AMICUS CURIAE OF ATTORNEY GENERAL MICHAEL A. COX IN SUPPORT OF DEFENDANT-APPELLEE CITY OF DEARBORN'S POSITION ON APPEAL

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INTRODUCTION

This Court has asked the parties in the above-captioned matter to brief the following issues: (1) whether application of the rule of *Pierson Sand & Gravel, Inc v Keeler Brass Co*,[1] to this case tends to encourage gamesmanship by giving plaintiffs an incentive to fail to plead a theory in federal court, with the hope of later litigating that theory in state court, because it was arguably possible, or even probable, that the federal court would have declined to exercise its jurisdiction; (2) whether there are distinguishing factors between this case and *Pierson*; (3) whether, if a plaintiff wants to preserve state law claims based on the same facts as an action it has brought in federal court, it should be obligated to plead them, or at least attempt to plead them, in the federal court; and, (4) whether the interests of federalism or state sovereignty are implicated by this case.

The Attorney General requests amicus status to brief the Court on these issues because any ruling of the Court as to the application of res judicata over state claims that were never filed by a plaintiff in federal court would impact the State in its defense of the approximately six-hundred federal cases it handles in the federal court system each year. Allowing plaintiffs to split these claims would only promote forum shopping, prejudice the defendant in shaping discovery and the defense of litigation, and add significantly to the cost and inconvenience of litigating. It is also contrary to concepts of judicial economy.

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[1] *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372 (1999).

ARGUMENT

I. The rule of *Pierson Sand & Gravel, Inc v Keeler Brass Co* as applied to this and all other cases encourages gamesmanship by giving plaintiffs an incentive to split state and federal claims, and an opportunity to harass defendants.

It is well-established that a plaintiff cannot litigate his case piecemeal.[2] The application of the doctrine of res judicata operates to prevent the splitting of a single cause of action.[3] The general rule of preclusion promotes full and fair resolution of the initially-filed action by disposing of a controversy in a single proceeding.[4] Michigan courts have applied the doctrine of res judicata broadly, barring not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.[5]

In most cases, plaintiffs' splitting of claims is voluntary and they are fully aware of the state claims when they decide not to join all relevant theories of relief in a single proceeding. Also, the doctrine of res judicata is not new or surprising; it is long-standing and well-established. Thus, plaintiffs would not be unfairly prejudiced by any uncertainty as to whether a trial judge would exercise supplemental jurisdiction. Nor does this uncertainty justify permitting plaintiffs to institute a multiplicity of proceedings that may have the effect of allowing them to harass defendants.[6] Res judicata is intended to protect "a victorious party from being dragged into court time and time again by the same opponent on the same cause of

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[2] *Clements v Constantine*, 344 Mich 446, 450; 73 NW2d 889 (1955).
[3] *Clements,* 344 Mich at 450-451; *Mendez v Bowie*, 118 F2d 435, 440 (1st Cir), cert denied, 314 US 639; 62 S Ct 76; 86 L Ed 513 (1941).
[4] *United Mine Workers v Gibbs*, 383 US 715; 86 S Ct 1130; 16 L Ed 2d 218 (1966).
[5] *Gose v Monroe Auto Equipt Co*, 409 Mich 147, 160-163; 294 NW2d 165 (1980).
[6] See *Harper Plastics Inc v Amoco Chemicals Corp*, 657 F2d 939, 946 (7th Cir, 1981) (multiple proceedings could harass defendants and uncertainty over district court's pendant jurisdiction does not justify it).

action."[7] While there are legitimate exceptions to the application of res judicata, these are limited to extraordinary situations such as, for example, where a party lacks incentive or full and fair opportunity to litigate in a prior action.[8] Allowing parties to sidestep res judicata without the existence of such an extraordinary situation encourages gamesmanship such as forum shopping, prejudicing defendants, adding unnecessary costs, and delaying resolution of disputes between parties. The loss of evidence and the loss or unavailability of witnesses or their memories are other potential consequences of such gamesmanship.

Cautious litigants generally review all theories of relief and bring them all in a single action to avoid the application of res judicata.[9] Not only does the rule of *Pierson* fail to encourage this level of care and diligence but it actually invites plaintiffs to make an intentional, strategic decision to prolong and complicate litigation for defendants. From the government's perspective, this could lead to disruption in agency operations, extended harassment of government officials, and pressure to settle claims with little or no merit. From the federal courts' perspective, "[i]f the entire case could be tried in state court, but only part of it could be litigated in federal court, then parties would have a strong incentive to eschew the federal forum."[10] Having a matter litigated in one court rather in two or more courts not only serves judicial economy but also preserves the attractiveness of the federal forum for litigants.[11]

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[7] *Magnus Electronics Inc v La Republica Argentina*, 830 F2d 1396, 1403 (7th Cir 1987).
[8] See, e.g., *Kremer v Chemical Constr Corp*, 456 US 461, 481; 102 S Ct 1883; 72 L Ed 2d 262 (1982); *Parklane Hosiery Co v Shore*, 439 US 322, 332; 99 S Ct 645; 58 L Ed 2d 552 (1979).
[9] See *Federated Dep't Stores v Moitie*, 452 US 394; 101 S Ct 24242; 69 L Ed 2d 103 (1981) (Blackman, J., concurring) (doubts at the pleading stage should be resolved in favor of joinder).
[10] Erwin Chemerinski, Federal Jurisdiction, § 5.4 (3d ed. 1999).
[11] Chemerinski at § 5.4.

II. Although the facts in *Pierson* can be distinguished from the facts of *Tate v City of Dearborn*, this case demonstrates the potentially negative effects of the rule in *Pierson*.

Pierson does not mandate that this Court reverse the Court of Appeals' decision in *Tate v City of Dearborn*.[12] In *Tate*, the Court of Appeals correctly concluded that principles of res judicata barred plaintiff's later state action arising out of the same transaction[13] *Tate* does illustrate, however, one of the many undesirable effects of *Pierson*: opening the door for plaintiffs to strategize in an attempt to circumvent the application of res judicata.

In *Pierson,* plaintiffs did not bring their state claim in federal court.[14] Thus, the court did not have the opportunity to exercise its discretion as to supplemental state claims. This Court held that because the district court dismissed all plaintiffs' federal claims prior to trial, it was "clear that the federal court would not have exercised its pendent jurisdiction over the remaining state law claims."[15]

In contrast, the plaintiff in *Tate v City of Dearborn* brought two claims in federal court—one for gross negligence and the other for intentional misconduct—and the federal court retained jurisdiction over these claims, entering judgment on both the federal and state claims.[16] The plaintiff later attempted to file an additional Elliott-Larsen Civil Rights Act claim in state court. This fact scenario did not require the state court to engage in speculative gymnastics as to whether the federal court would have exercised its jurisdiction over state claims, because the federal court had already chosen to exercise its jurisdiction over supplemental claims.

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[12] *Tate v City of Dearborn*, No. 261950 (MI Ct App 2005).
[13] *Tate,* No. 261950 (order).
[14] *Pierson*, 460 Mich at 375 (1999).
[15] *Pierson*, 460 Mich at 379 (emphasis added) (citing *Sherwin-Williams Co v Hamtramck*, 840 F Supp 470, 479 (ED Mich 1993).
[16] *Tate v City of Dearborn*, No. 01-72605 (E.D. MI 2006).

Interestingly, however, the federal court's action in *Tate* undermines the very premise on which *Pierson* was decided. The plaintiff's actions also illustrate the extent of the gamesmanship in which plaintiffs will attempt to engage now that *Pierson* shields them from the undesirable consequences of res judicata. Not only does *Pierson* encourage plaintiffs to split federal and state claims, but it also opens the door for plaintiffs to pick and choose which state claims they will file in federal court and which they will reserve for state court, wasting valuable judicial resources by later arguing that the federal court would not have exercised jurisdiction over the particular state claim or claims they chose to omit.

III. *Pierson* should be overruled because, congruent with longstanding principles of res judicata, a plaintiff who wants to preserve state law claims based on the same facts as an action it has brought in federal court, should be obligated to plead them, or at least attempt to plead them, in federal court.

A. A federal judge's decision to dismiss a plaintiff's federal claims, does not "clearly" indicate that, as a matter of routine practice, all federal courts would have exercised their discretion to dismiss claims over which they have supplemental jurisdiction.

The rationale for the rule in *Pierson* stems from a very narrow exception to Michigan's traditionally broad application of res judicata.[17] This narrow exception is embodied in Restatement of the Law, Second, Judgments, comment e to § 25:[18]

> If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded.

The *Pierson* court, relying on this exception, held that although the district court would have had jurisdiction over state law claims had they been raised, because the district court dismissed all plaintiffs' federal claims prior to trial, it was "clear that the federal court would not

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[17] *Pierson*, 460 Mich at 380.

[18] Restatement (Second) of Judgments, § 25 comment e (emphasis added).

have exercised its pendent jurisdiction over the remaining state law claims."[19] This is an overly broad reading of the exception which, by its plain language, applies only where, as a matter of law, a court lacked all jurisdiction. In *Pierson*, as in all federal cases, the decision not to exercise supplemental jurisdiction is matter of discretion to be declined only after weighing several factors.[20]

A jurisdictional decision can hardly be clear—as it must be under § 25—where the federal court has both the power and the discretion to exercise jurisdiction. The only possible interpretation of comment e of the Restatement is one that reconciles this seemingly contradictory language as recognizing that the federal court's result would be "clear" only when the federal court, as a matter of law, is left with no discretion to keep the appended state case.[21] Any other interpretation forces state courts to engage in improper speculation as to what the district courts *might have done.*[22] This correct interpretation of comment e of the Restatement would require plaintiffs to file state claims in federal court in order to invoke the court's supplemental jurisdiction and thereby accurately document the court's exercise of discretion over supplemental jurisdiction.

Thus, *Pierson* should be overruled. In place of the broad rule in *Pierson*, state courts should choose to give relief only in "special cases" as the facts warrant.[23] To hold otherwise excuses plaintiffs from meeting their obligations to join all claims and provide fair notice to

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[19] *Pierson*, 460 Mich at 379 (emphasis added) (citing *Sherwin-Williams*, 840 F Supp at 479.
[20] 28 USC § 1367(a); 28 USC § 1367 (c).
[21] See *Gilles v Clifton Ware*, 615 A2d 533, 542 (D.C. Cir, 1992) (per curium) (Judges Wagner and Ferren in the majority agreeing on a bright-line rule that the mere prediction that a federal court will most likely dismiss a state law claim is insufficient).
[22] *Gilles*, 615 A2d at 541 (characterizing as "unworkable" the "pure speculation" required to justify allowing plaintiffs to file state claims when pendant state claims were never filed in the federal complaint).
[23] *Pierson*, 460 Mich at 380 (citing *Hackley v Hackley*, 426 Mich 582, 584; 395 NW 2d 906 (1986) (stating that res judicata applies, except in special cases).

defendants of those claims in a timely manner that avoids harassment and additional costs, and promotes judicial economy and litigation certainty and finality.

In *Pierson*, this Court cited the growing number of federal circuits that are dismissing state claims without prejudice when federal claims are dismissed before trial.[24] While this might well be the general pattern based on past experiences, such action is neither mandatory nor the consistent practice.[25] A federal court is not obligated automatically to dismiss a supplemental state claim simply because it grants summary judgment on a federal claim.[26] Federal courts are empowered to entertain state claims when "[t]he state and federal claims . . . derive from a common nucleus of operative fact."[27] When a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding. the federal courts have the power to hear the whole case.[28]

Thus, the district court still has the discretion to make this decision in each federal case, even where the federal claim is dismissed before trial. The United States Supreme Court has even explained that "when deciding whether to exercise supplemental jurisdiction, a federal court should consider and weigh *in each case*, and at every stage in the litigation, the values of judicial economy, convenience, fairness, and comity."[29] Attempts to second-guess the federal court are speculative at best. Even where the federal court decides not to continue exercising supplemental jurisdiction after the federal claim is dismissed before trial, the gamesmanship and harassment promoted by *Pierson* is avoided. The parties will have had fair notice of all claims and defenses; evidence and witnesses would be preserved and identified; and discovery is

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[24] *Pierson*, 460 Mich at 383.
[25] *Carnegie-Mellon Univ v Cohill*, 484 US 343, 350 n.7; 108 S Ct 614; 98 L Ed 2d 720 (1988).
[26] *Hagans v Lavine*, 415 US 528, 539-540; 94 S Ct 1372; 39 L Ed 2d 577 (1974).
[27] *United Mine Workers*, 383 US at 725.
[28] *United Mine Workers*, 383 US at 725.
[29] *City of Chicago v Int'l College of Surgeons*, 522 US 156, 162-163; 118 S Ct 523; 139 L Ed 2d 525 (1997). (emphasis added.)

typically completed. If the state claims are remanded to or refiled in state court, the interests of all parties have been protected. Costs are significantly reduced where discovery has been completed, and the case is ready for submission to alternative dispute resolution—for example, a facilitator or case evaluation—if appropriate.

A number of federal circuits require plaintiffs to file all claims, federal and state, in one action. The Seventh Circuit, for example, has held that in virtually every case, plaintiffs should file all state claims and test the court's discretion.[30] That circuit has also rejected plaintiffs' arguments that it is unfair both to require plaintiffs to join all theories of relief in a single proceeding, and to force state law claims on federal courts.[31] Judges from the District of Columbia Circuit have followed the Seventh Circuit's reasoning, stating that "there is no basis for a plaintiff or a state court to conclude with any reliable degree of certainty that the federal court 'clearly' would have dismissed the supplemental state law claim" once the federal complaint is disposed of on summary judgment."[32] That circuit further advocates for a bright-line rule that a federal court's decision is clear only when left with no discretion as a matter of law.[33] The alternative—allowing a party to split state and federal claims—is "based on the mere fortuity of a federal court's granting summary judgment to a defendant on a federal claim to which a pendent state claim readily could have been–but was not—added."[34] The purpose behind this bright-line rule is to "promote the interests of the disputing parties in judicial economy and in litigation certainty."[35]

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[30] *Harper Plastics*, 657 F2d at 946; see also, *Lee v Village of River Forest*, 936 F2d 976, 980 (7th Cir. 1991).
[31] See *Harper Plastics*, 657 F2d at 945-46.
[32] *Gilles*, 615 A2d at 541.
[33] *Gilles*, 615 A2d at 5412
[34] *Gilles*, 615 A2d at 542.
[35] *Gilles*, 615 A2d at 542.

Likewise, the Tenth Circuit has held that "the district court retains the discretion to exercise jurisdiction over the supplemental claim [even] after pretrial adjudication of the federal claim."[36] In *Nwosun v General Mills Restaurants, Inc*, an employee brought suit in state court for retaliatory discharge and in the federal court for race discrimination under Title VII.[37] After the federal court entered summary judgment, the plaintiff amended his state court complaint to include the Title VII allegation and the defendant removed the suit to federal district court.[38] The federal court held that the state law claim was barred by res judicata since it could have been raised along with the title VII in the first federal suit.[39] On appeal, the Tenth Circuit held that "it would be pure speculation to conclude that the district court would not have exercised its jurisdiction over the state claim had it been brought in the federal action."[40] The court further stated, "If we were to participate in the speculative gymnastics required to determine whether a federal court would or would not have exercised its supplemental jurisdiction over a state claim never brought, we would be doing disservice to the policy considerations res judicata protects."[41]

State courts have held similarly.[42] In *McLearn v Cowen*, for example, the Court of Appeals of New York reviewed the validity of a dismissal by the Appellate Division of a common-law action for damages based on res judicata, because plaintiff had not presented the common-law action along with her federal case that arose out of the same series of connected transactions.[43] That court held that there was no basis for failing to give preclusive effect to the disposition in the federal forum because the scope of dismissal of the federal action was not

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[36] *Nwosun v Gen'l Mills Restuarants Inc*, 124 F3d 1255 (10th Cir, 1997).
[37] *Nwosun*, 124 F3d at 1256-67.
[38] *Nwosun*, 124 F3d at 1257.
[39] *Nwosun*, 124 F3d at 1257.
[40] *Nwosun*, 124 F3d at 1258.
[41] *Nwosun*, 123 F3d at 1258 (citing Restatement Second of Judgments, 1981, § 25 comment e and Reporter's Note).
[42] See, e.g., *Hayes v Town of Orleans*, 39 Mass App Ct 682; 660 NE2d 383 (MA App Ct, 1996).
[43] *McLearn v Cowen*, 48 NY 2d 696, 698-99 (NY Ct App 1979).

raised or even considered by the parties or by the court and nothing in the record supported even the slightest inference that the court would have declined to exercise jurisdiction over a common-law cause of action.[44] The Appeals Court of Massachusetts in *Hayes v Town of Orleans* recognized that the question is not whether the federal court definitely or even probably would have entertained the action, but rather, whether it is clear that they would have decided to exercise supplemental jurisdiction.[45] In a situation where victims filed only § 1983 claims in a federal court against the town police for assault, and then prior to the entry of judgments in the Federal case, brought an action against the town under the state tort claims act,[46] the court held that "the federal court was not obligated to deny jurisdiction of the state claim against the town after the federal claim against it was dismissed."[47] That court also noted that the practice of declining to exercise jurisdiction over remaining state-law claims, is not an inflexible one.[48] Under similar facts, the Court of Appeals of Texas has held that comment e of the Restatement "starts from the premise that the federal judge would be adjudicated [sic] the state law claims." "In cases of total silence, the state court is left to presume res judicata applies. This rule might not be intuitively obvious, but is supported by the overwhelming weight of authority." [49]

B. Allowing plaintiffs to split claims and preserve state claims not pleaded in federal court is patently unfair to defendants.

The United States Supreme Court has stated that "'[s]imple justice' is achieved when a complex body of law developed over a period of years is even handedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of

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[44] *McLearn*, 48 NY 2d at 699.
[45] *Hayes*, 30 Mass App Ct at 687.
[46] *Hayes*, 39 Mass App Ct at 684.
[47] *Hayes*, 30 Mass App Ct at 686.
[48] *Hayes*, 30 Mass App Ct at 686.
[49] *Mohamed v Exxon Corp & Exxon Minerals Co,* 796 SW2d 751 (Tex Ct of App, 1990) (citing *Anderson v Phoenix Inv Counsel of Boston*, 387 Mass 444, 440 NE 2d 1164, 1168-69 (1982)); *Maldonado v Flynn*, 417 A2d 378, 383-84 (Del Ch 1980).

the equities in a particular case."[50] Therefore, the application of res judicata to plaintiffs who have failed to plead state claims along with their federal claims in federal court is neither inequitable nor unfair.

Moreover, modernization of procedural rules in federal and many state jurisdictions has greatly expanded the role of res judicata.[51] For example, federal rules regarding joinder of claims, joinder of parties, liberalized pleading and amendment rules, and broad discovery opportunities have made inevitable the narrowing of the situations in which a second opportunity to litigate need be given.[52] Michigan rules of joinder are not only similarly permissive but require plaintiffs to plead all claims arising out of the same transaction.[53] Additionally, Michigan also recognizes that amendments to pleadings are to be freely granted.[54] Therefore, under our modern permissive system of procedure, there needs to be a compelling reason to sustain a plea for a second chance. No such reason is presented by the situation where a plaintiff voluntarily decides not to file his state claim along with his federal court action where the state claim arises out of the same set of facts.

In contrast, allowing a plaintiff to voluntarily split his claims is patently unfair to defendants. First, it gives defendants either no notice of state law claims, or, as illustrated by *Tate*, inadequate notice as to the nature and extent of *all* state claims. Second, it prejudices defendants who have likely already shaped the litigation, including discovery, defenses, and settlement decisions, based on the claims that are asserted. It also potentially creates needless delay that may result in loss of witnesses or evidence. Third, it unnecessarily increases the cost

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[50] *Federated Dep't Stores, Inc v Moitie*, 452 US 394, 401; 101 S Ct 2424; 69 L Ed 2d 103 (1981).
[51] C. Wright, Law of Federal Courts 678-79 (1983).
[52] Wright, Federal Courts at 679.
[53] See MCR 2.203(A).
[54] *Spartan Asphalt Paving Co v Grand Ledge Mobile Home Park*, 71 Mich App 177; 247 NW2d 589 (1976), rev'd on other grounds, 400 Mich 184; 253 NW2d 646 (1977).

of litigation, both in the cost of instituting another suit and in additional discovery or witnesses that may be required by the addition of claims, as well as time and attorneys fees. Fourth, it deprives defendants of the certainty and finality of litigation that res judicata promotes. Defendants should be able to rely on a federal court judgment and put a case to rest. Fifth, it relieves plaintiffs of their burden to preserve claims, a burden supported by MCR 2.203(A), which sets forth the parameters for joinder of claims.

IV. *Pierson* violates principles of comity and federalism, and contradicts MCR 2.203(A).

While res judicata is largely a common law principle involving the impropriety of parties having two bites of the apple,[55] *Pierson* also implicates principles of comity and federalism. It encroaches on the delineation of power given to the lower federal courts to make a discretionary decision as to whether to exercise supplemental jurisdiction over state claims.

The *Pierson* court stated that its approach to comment e of the Restatement is "supported by the comity implications of supplemental jurisdiction."[56] That comity runs both ways. A state court's decision whether to entertain state law claims not brought in federal court after the federal court's action must also respect the power of that federal court to make its own discretionary decision as to supplemental claims. State courts may not simply assume what the federal courts might have done with respect to supplemental jurisdiction. *Pierson* also, in effect, improperly restricts the jurisdiction of the federal courts by presupposing a decision the federal court may not make.[57] *Pierson* essentially eliminates the federal courts' discretion to exercise the supplemental jurisdiction by removing court sanctions for failing to properly join all claims.

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[55] *Lemonds v St Louis County*, 222 F3d 488, 495 (8th Cir, 2000).
[56] *Pierson*, 460 Mich at 385.
[57] See *Markham v Newport News*, 292 F2d 711, 716 (4th Cir, 1961) (laws of a state cannot enlarge or restrict the jurisdiction of the federal courts).

Thus, in Michigan, under *Pierson*'s rule, state law claims need not be joined in any federal action.

Finally, the rule in *Pierson* is contrary to MCR 2.203(A) on compulsory joinder. That rule states that "in a pleading that states a claim against an opposing party, the pleader must join *every claim* that the pleader has against an that opposing party *at the time of serving* the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction."[58]

[58] MCR 2.203(A) (emphasis added).

CONCLUSION

This Court in *Pierson* stated that the rule in *Pierson* is a narrow exception to the application of res judicata, rather than a retreat from Michigan's broad application of the doctrine.[59] This Court further stated its intent not to condone or encourage the failure of plaintiffs to include state claims in a federal action,[60] Unfortunately for defendants, this will be the result. While this Court has noted that res judicata is not a constitutional mandate, but a tool created by the courts,[61] application of the doctrine of res judicata relieves parties of the cost and vexation of multiple lawsuits, insures finality and fairness, and conserves precious judicial resources. Accordingly, Attorney General Michael A. Cox urges this court not only to conclude that the state claims of the plaintiff in *Tate v City of Dearborn* are barred by the doctrine of res judicata, but also to overrule *Pierson* and apply Michigan's traditional long-standing doctrine of res judicata.

Respectfully submitted,

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[59] *Pierson*, 460 Mich at 382.
[60] *Pierson*, 460 Mich at 387.
[61] *Pierson,* 460 Mich at 382.